The decision might have been rested on the plaintiff's first breach under the prevailing American rule which treats as vital a default in one instalment, though not accompanied by insolvency or repudiation as required by English cases. *Rugg v. Moore* (1885) 110 Pa. St. 236, 1 Atl. 320; Wald's Pollock, *Contracts* (Williston's ed.) 332, note; cf. *Freeth v. Burr* (1874) L. R. 9 C. P. 208; *Mersey Steel & Iron Co. v. Naylor* (1884) 9 A. C. 434. The court, however, did not discuss this point, but assuming the defendant's failure to deliver coal as the first "vital breach," saw only two courses open to the plaintiff if he wished to recover for loss of the contract. He could "treat the contract as terminated" and sue at once, or treat it as subsisting and sue at the end of the term. But in the latter case, he had to show complete performance on his part and keep the contract alive for the benefit of all parties. This is the English doctrine of anticipatory repudiation. *Hochster v. De la Tour* (1852, Q. B.) 2 E. & B. 678. Its application to an actual breach may be attributed to the peculiar Illinois rule that, though a breach in one instalment, without repudiation, excuses the other party from going on, he cannot, after ceasing performance on this ground, recover damages for the loss of the contract. *Keeler v. Clifford* (1897) 165 Ill. 544, 46 N. E. 248. Hence the court apparently considered that the plaintiffs' rights rested not on the defendant's breach, but on the accompanying repudiation. This seems an unfortunate departure from the general rule that any actual breach which excuses further performance gives an immediate right of action for loss of the entire contract. *Pierce v. Tennessee etc. Co.* (1898) 173 U. S. 1, 19 Sup. Ct. 335; Wald's Pollock, *Contracts* (Williston's ed.) 363, n. 20.

M. B.

CONTRACTS — THIRD PARTY BENEFICIARY — BOND TO SECURE PAYMENT OF MATERIAL MEN.—The defendant, as surety, gave a bond to the Passaic Valley Sewerage Commissioners to secure the performance of a building contract. The bond was conditioned to be void, "if the contractor shall pay for all labor and materials furnished and shall perform all the obligations of his contract." The plaintiff, having furnished materials, sued upon the bond. *Held,* that the plaintiff was not a beneficiary within the meaning of a statute (Comp. St. 1910, p. 4059, sec. 28) giving a right of action to third parties for whose benefit a contract is made, the bond being solely to indemnify the obligee. *Standard Gas Power Corp. v. New England Casualty Co.* (1917, N. J. Ct. Err.) 101 Atl. 281.

A third party beneficiary is allowed to sue in New Jersey, whether he is a creditor or a donee beneficiary. *Berry v. Doremus* (1863, Sup. Ct.) 30 N. J. L. 399; *Joslin v. New Jersey Car Spring Co.* (1873, Sup. Ct.) 36 N. J. L. 141; *Whitehead v. Burgess* (1897, Sup. Ct.) 61 N. J. L. 75. The court in the principal case denies a remedy to the plaintiff solely on the ground that he was not intended as a beneficiary. As a general proposition, public property is not the subject of a mechanic's lien. *Frank v. Hudson Co.* (1877, Sup. Ct.) 39 N. J. L. 347. If such were the case here the plaintiff should have been given the right to sue as the sole beneficiary; for the obligee would then have no interest of his own to protect by securing payment of the material men, and the latter must have been intended as beneficiary. *Baker v. Bryan* (1884) 64 Ia. 561, 21 N. W. 83; *King v. Downey* (1899) 24 Ind. App. 262, 56 N. E. 680. By statute in New Jersey, however, a mechanic's lien on public property is given. *Commissioners v. Fell* (1894, Ch.) 52 N. J. E. 689, 29 Atl. 816; Act of Mar. 30, 1892 (3 Comp. St. p. 3315) P. L. 1892 p. 369, as amended P. L. 1909 p. 260. Under such a statute it is a reasonable inference that the bond is one of indemnity to protect the obligee against loss that might result from the filing of liens. This tends to show that the bond in the principal case was not in fact made for the benefit of the material men. In other jurisdictions material men have been allowed to

maintain suit on such a bond irrespective of the question whether or not a material man has a lien on public buildings. *School District v. Livers* (1899) 147 Mo. 580, 49 S. W. 507; *Kaufmann v. Cooper* (1896) 46 Neb. 644, 65 N. W. 796. By Federal statutes (30 St. 906, ch. 218, 33 St. 811, c. 778) material men are expressly given the right to sue in the name of the United States on construction bonds given to the government. *Equitable Surety Co. v. McMillan* (1913) 234 U. S. 448, 34 Sup. Ct. 803; *Illinois Surety Co. v. Davis Co.* (1916) 37 Sup. Ct. 614.

F. C. H.

DEATH BY WRONGFUL ACT—NATURE OF PLAINTIFF'S RIGHT—EFFECT OF RELEASE BY DECEDENT.—The husband of the plaintiff while a passenger on a car of the defendant corporation received injuries which ultimately resulted in death. Before his death he had executed a release of liability to the defendant. The widow brought suit under a statute which provides that: "When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, ..." *Held*, that, the release by the husband was not a bar to the plaintiff's cause of action. *Earley v. Pacific El. R. Co.* (1917, Cal.) 167 Pac. 514.

By the common law the death of a human being could not be complained of as a civil injury. *Baker v. Bolton* (1808) 1 Camp. 493. In 1846 Lord Campbell's Act—the foundation, with various modifications, of subsequent American legislation—created a new right of action in favor of the persons for whose benefit a suit by the decedent's administrator or executor was authorized. *Blake v. Midland Ry. Co.* (1852) 18 Q. B. 93, 110. It was not a "survival act" and hence the injured person's right of action still terminated with his death. *Pulling v. Great Eastern Ry. Co.* (1882) L. R. 9 Q. B. D. 110. But Lord Campbell's Act gave the new right subject to the condition that the injury must be "such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof." 9 & 10 Vict. (1846) c. 93. Consequently a release by the injured person would bar a suit for the benefit of the widow or other relatives. *Read v. Great East. Ry. Co.* (1868) 3 Q. B. 555. The courts in this country in construing statutes with a similar clause have followed the English decisions. *Southern, etc. Co. v. Cassin* (1900) 111 Ga. 575, 36 S. E. 881; *Jones v. Kansas City Ry. Co.* (1903) 178 Mo. 528, 77 S. W. 890. But there are a number of statutes in this country which do not contain such a provision and under such statutes a release given by the injured party does not bar the beneficiaries' right of action. *Eichorn v. New Orleans, etc. Co.* (1904) 112 La. 236, 36 So. 335. *Donahue v. Drexler* (1884) 82 Ky. 157. Similarly, in states which have a "survival act" and also an act creating a new and separate cause of action, recovery under one should not logically bar recovery under the other; and some courts so hold. *Davis v. St. Louis, etc. R. Co.* (1890) 54 Ark. 389, 13 S. W. 801. *Stewart v. United Electric Light & Power Co.* (1906) 104 Md. 332, 65 Atl. 49. *Contra, Louisville & Nashville R. R. Co. v. McElwain* (1896) 98 Ky. 700, 34 S. W. 236. The difficulty, both in the decisions and in the legislation, has arisen from a failure to recognize that two independent rights are involved, one being that of the injured person, the other that of the next of kin not to be injured in support.

J. N. M.

EJECTMENT—ENCROACHING BAY WINDOW AND EAVES.—The bay window and eaves of the defendant's house projected nearly five feet over the line of the